

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Reasons for granting the writ	10
Conclusion	24
Appendix	25

CITATIONS

Cases:

<i>Burley Irrigation District v. Ickes</i> , 116 F. (2d) 529, 535.....	19, 22
<i>California Pastoral & Agricultural Co. v. Madera Canal & Irr. Co.</i> , 167 Cal. 78, 81.....	20
<i>Combs v. Agricultural Ditch Co.</i> , 17 Colo. 146.....	20
<i>Farmers' Cooperative Ditch Co. v. Riverside Irr. Dist.</i> , 16 Idaho 525.....	20
<i>Hardy v. Beaver County Irr. Co.</i> , 65 Utah 28, 41.....	20
<i>Hough v. Porter</i> , 51 Ore. 318, 420.....	20
<i>Hufford v. Dye</i> , 162 Cal. 147, 159.....	20
<i>Ickes v. Fox</i> , 300 U. S. 82.....	10, 14, 15
<i>Ickes v. Fox</i> , 66 App. D. C. 128, 85 F. (2d) 294, affirmed, 300 U. S. 82.....	9
<i>Moore v. Anderson</i> , 68 F. (2d) 191, certiorari denied, 293 U. S. 567.....	8
<i>Nebraska v. Wyoming</i> , 305 U. S. 561.....	12
<i>Nichols v. Hufford</i> , 21 Wyo. 477, 492.....	20
<i>Rhoades v. Barnes</i> , 54 Wash. 145.....	13
<i>Shafford v. White Bluffs Land & Irr. Co.</i> , 63 Wash. 10, 14.....	20
<i>State v. Twin Falls Canal Co.</i> , 21 Idaho 410.....	20
<i>Swigart v. Baker</i> , 229 U. S. 187, 197.....	16
<i>Tulare Irrigation District v. Lindsey-Strathmore Irr. Dist.</i> , 3 Cal. (2d) 489.....	21
<i>Twin Falls Salmon River Land & W. Co. v. Caldwell</i> , 242 Fed. 177, 193-194, affirmed, 225 Fed. 584, 591, 599.....	15
<i>Vineyard Land and Stock Co. v. Twin Falls Oakley Land and Water Co.</i> , 245 Fed. 30, 33.....	20, 21, 22

(I)

II

Cases—Continued.

	Page
<i>Wenatchee Reclamation District v. Titchenal</i> , 175 Wash. 398, 404.....	15
<i>Weidensteiner v. Mally</i> , 55 Wash. 79.....	13
<i>Yuma County Water Users' Association v. Schlecht</i> , 262 U. S. 138.....	16

Statutes:

Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U. S. C., c. 12).....	4
Section 1, 43 U. S. C., Sec. 391.....	16, 25
Section 4, 43 U. S. C., Secs. 419, 461.....	4, 16, 25
Section 5, 43 U. S. C., Secs. 431, 439, 381, 392.....	14, 26
Section 8, 43 U. S. C., Secs. 372, 383.....	27
Section 10, 43 U. S. C., Sec. 373.....	28
Act of April 16, 1906, Sec. 4 (34 Stat. 116, 43 U. S. C., Sec. 567).....	14
Act of April 30, 1908 (35 Stat. 85).....	14
Act of February 21, 1911 (36 Stat. 925, 43 U. S. C., Secs. 523, 524, 525).....	14
Reclamation Extension Act of August 13, 1914 (38 Stat. 686, 43 U. S. C., c. 12):	
Sections 1 and 2, 43 U. S. C., Secs. 471, 472, 475.....	14
Section 4, 43 U. S. C., Sec. 469.....	23, 28
Act of March 3, 1915 (38 Stat. 861, 43 U. S. C. 470).....	24, 29
Act of January 25, 1917 (39 Stat. 868).....	14
Act of February 25, 1920 (41 Stat. 451, 43 U. S. C., Sec. 521).....	14
Act of December 5, 1924, Sec. 4B (43 Stat. 702, 43 U. S. C., Sec. 412).....	18
Act of May 25, 1926, Sec. 45 (44 Stat. 648).....	14
Act of December 21, 1928, Sec. 5 (45 Stat. 1060, 43 U. S. C., Sec. 617d).....	14
Reclamation Project Act of August 4, 1939, Sec. 9 (53 Stat. 1187).....	14, 18
Act of October 14, 1940, Sec. 9 (54 Stat. 1119).....	14
Remington Revised Statutes of Washington:	
Sections 7408-7411 (Wash. Sess. Laws 1905, c. 88, pp. 180-183).....	3, 4, 29
Section 7410 (Wash. Sess. Laws 1905, p. 180, sec. 3) ..	12, 13
Miscellaneous:	
Annual Report of Secretary of the Interior, 1942, pp. 5, 14, 24.....	16
Kinney on <i>Irrigation and Water Rights</i> (2d Ed.):	
Sections 877, 916, pp. 1547, 1622.....	20
Sections 1513, 1514, pp. 2723, 2727.....	15

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

MAZINE Z. FOX, ET AL.

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

PHILIP LOUIS PARKS, ET AL.

No. —

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

CHRISTINA MARIEA EDER, EXECUTRIX OF LAST WILL
AND TESTAMENT OF JACOB F. OTTMULLER, DE-
CEASED

PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

The Solicitor General, on behalf of the Secre-
tary of the Interior, prays that writs of certiorari

issue to review the judgments of the United States Court of Appeals for the District of Columbia entered in the above-entitled causes on June 30, 1943, reversing the judgments of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the Court of Appeals (R. ^{II, 14504} ~~II, 14504~~) is not yet reported. The District Court filed a memorandum opinion (R. I, 271) and findings of fact and conclusions of law (R. I. 303, 324, 330, 350, 361, 383).

JURISDICTION

The judgments of the United States Court of Appeals for the District of Columbia sought to be reviewed were entered on June 30, 1943 (R. III, 1460). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondents are water users upon a reclamation project. Their water-right contracts call for 3 acre-feet per acre per annum, to take the simplest example, and accept a construction charge of \$52 per acre. Until 1930 they were allowed the free use of additional water. Thereafter, because of recurring water shortages and the impending full development of distribution systems on the project, the Secretary of the Interior announced that the additional water must be paid for. Respondents

brought suit to enjoin him. The principal questions presented are:

1. Whether reclamation project water users because of past use are entitled to receive indefinitely and without charge amounts of water in excess of that fixed by their water-right contracts. This question, of great importance in the administration of the reclamation program, turns on the basis and the measure of the users' water rights.

2. Whether the court below, in holding that beneficial use differs essentially from an economical use, erred in dispensing with the test of reasonable economy in the use of water, and in thus requiring the Secretary to deliver water in excess of amounts found by him to be reasonably needed for beneficial use.

3. Whether the reclamation laws prevent the Secretary from (a) charging for additional water developed by additional construction, or (b) undertaking additional construction where a majority of the water users in a project involved, though not in one division thereof, agree to repay the cost.

STATUTES INVOLVED

The pertinent provisions of the federal reclamation law (43 U. S. C. c. 12) and statutes of Washington (secs. 7408-7411, Remington Revised Statutes of Washington, Sess. L. of 1905, c. 88, pp. 180-183) are set forth in the Appendix, *infra*, pp. 25-33.

STATEMENT

The salient facts found by the District Court (R. I, 303, 330, 361) are as follows: The lands of respondents are located within the Sunnyside Division, one of five main divisions of the Yakima reclamation project in Washington. The Sunnyside Division is represented by the Sunnyside Valley Irrigation District. The Yakima project was initiated in 1905, pursuant to the Reclamation Act of June 17, 1902 (32 Stat. 388, 43 U. S. C. c. 12), and in conformity with the statutes of the State of Washington (8 Remington Revised Statutes, secs. 7408-7413). In undertaking the construction and operation of the Yakima project, the United States withdrew and appropriated all of the then unappropriated waters of the Yakima River, in full compliance with the laws of Washington (R. I, 306-307, 333-334, 364-365). The United States also purchased the comparatively small canal system and related water rights of the Washington Irrigation Company (R. I, 336).

Pursuant to the provisions of section 4 of the Reclamation Act (43 U. S. C. secs. 419, 461), the Secretary of the Interior on March 2, 1909, issued a public notice announcing \$52 as the construction charge per acre and 3 acre-feet per acre per annum as the amount of water to be furnished for the land described in the notice, including the lands of respondents Eder and Fox (R. I, 309, 336, 367). The water-right contracts between the United

States and the predecessors in interest of these respondents each provide, in different ways, for furnishing 3 acre-feet of water in return for a construction charge of \$52 per acre.¹ Parks' predecessors made a contract with the United States which called for 3 acre-feet of water "or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, * * *" (R. I, 339).²

¹ In the *Eder* case, the water right contract provides that "the quantity of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land," and "the applicant hereby agrees * * * to pay for said water right the estimated cost of construction as fixed by the Secretary of the Interior, namely, the sum of \$52.00 per acre * * *" (R. I, 368-369). In the *Fox* case, the water right contracts provide for the payment of the \$52 construction charge and that "the measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States * * *." The amount of irrigable land included in the Sunnyside Division and the amount of water actually available for the lands under the division is such that the share proportionate to irrigable acreage as specified in the contracts of the predecessors of Fox is equivalent to 3 acre-feet per acre per annum (R. I, 310-311).

² The consideration was the conveyance of the then owner's pre-existing water right from the Company, equivalent to 2.6 acre-feet, plus a construction charge of \$10 per acre (R. I, 337-338), not \$52 an acre as indicated in the opinion of the Court of Appeals (R. III, 1451).

Prior to 1930, water deliveries substantially in excess of 3 acre-feet had been made to respondents' lands. This was under the "holler" system, by which calls for additional water were met, when the surplus water was available, whether or not the water was actually needed for beneficial use. The "holler" system resulted in a wasteful use of the water (R. I, 311, 342, 369). Prior to 1930 there had never been a determination by an agent or official of the United States as to the amount of water "required to successfully irrigate the land," or that the amounts actually delivered were necessary to irrigate beneficially respondents' lands (R. I, 312, 342, 370).

In 1930, however, the project was facing years of water shortage by reason of severe dry cycles. At the same time the period of construction of storage in advance of the construction of distribution systems, which had made possible excess deliveries in the past, was drawing to a close. The delivery of excess water on the basis of the "holler" system could not be continued. In the interests of the project as a whole, including the Sunnyside Division, it was necessary that construction of the Cle Elum Dam and Reservoir be undertaken (R. I, 315-316, 345-346, 374-375). If the lands in the Sunnyside Division were to continue to receive water in excess of the amounts the United States had agreed to deliver, and if in dry years, for "insurance," the lands in the divi-

sion were to receive substantially their contract amounts, it would be necessary that they participate in the repayment of the cost of constructing the storage works necessary to develop and supply the additional water (R. I, 316, 375, 346-347).

The Sunnyside Valley Irrigation District was interested in purchasing an additional water supply but it did not know how much additional water would be needed, and it requested that a determination be made of the amounts of water required "to successfully irrigate" the lands, as provided in the Parks' type of contract (R. I, 317, 347, 375; Def. Ex. 71, R. III, 1320-1322). Thereafter, the notice of October 17, 1930, was issued by the Secretary (R. I, 317, 347, 376; Def. Ex. 17, R. II, 950-953). This notice provided that during 1931, and thereafter until further notice, water deliveries would be limited under the public notice contracts (Eder and Fox) to the 3 acre-feet specified in the contracts; so long, however, as there was surplus stored water available, excess water could be rented by water users for \$1.50 per acre-foot, the payments to be credited toward the unsecured portion of the construction costs of the reservoir system of the Yakima project. The notice also provided, with respect to the lands such as Parks', for the determination of the amount of water required "to successfully irrigate" the lands, and announced that the delivery of water in subsequent years would be governed by such

determination. After this determination had been made through a well-qualified expert (R. I, 340-341), the Secretary, on May 5, 1922, issued a public notice restricting the amount of water to the approved determination (3.5 acre-feet in the case of Parks) and providing that additional amounts likewise would be subject to water rental charges (R. I, 341; Pl. Ex. 13, R. II, 956-957).

When the Government during the irrigation season of 1932 attempted to deliver water in accordance with these notices, the District through representative water users, obtained a temporary injunction in the United States District Court for the Eastern District of Washington. The Circuit Court of Appeals for the Ninth Circuit dissolved this injunction and directed dismissal on the ground that the Secretary of the Interior was a necessary party. *Moore v. Anderson*, 68 F. (2d) 191, certiorari denied 293 U. S. 567.

Respondents' actions were then brought, as test cases, in the District of Columbia. Their amended complaints (R. I, 1, 49, 71) alleged that the successive Secretaries of the Interior had determined, by "a practical construction" of the contracts, that 4.84 acre-feet in the Fox case, 5.56 acre-feet in the Eder case, and 6 acre-feet in the Parks case were necessary to irrigate beneficially their lands; and that the right to the use of those amounts had vested in respondents and had become appurtenant to their lands. It was further alleged that 3 acre-

feet in the Fox and Eder cases and $3\frac{1}{2}$ acre-feet in the Parks case is not sufficient to irrigate beneficially respondents' lands. Petitioner's motions to dismiss the amended complaints were denied. On special appeals, the Court of Appeals (66 App. D. C. 128, 85 F. (2d) 294) affirmed, as did this Court on certiorari (300 U. S. 82).

After an extended trial on the merits, the District Court found the facts in every material respect to be contrary to those alleged in the amended complaints (R. I, 303, 330, 361). It held, in summary, that the action of petitioner in issuing the notices was within the scope of his authority and was not in violation of any rights of respondents, which were based upon their contracts with the United States. The court further held that respondents did not make beneficial use of the water in excess of 3 acre-feet in the Fox and Eder cases or 3.5 acre-feet in the Parks case (R. I, 324, 355, 383). It accordingly entered judgments dismissing respondents' complaints (R. I, 329, 360, 388).

The Court of Appeals reversed the District Court on the grounds that the District Court failed to follow the earlier decision of this Court, and that the District Court's findings on beneficial use were based upon an erroneous theory. It directed that the Secretary be enjoined from imposing a charge for such additional water as he should determine "may be used" on the respondents'

lands, and that in making that determination he be enjoined from "construing their applications as contracts."

REASONS FOR GRANTING THE WRIT

The decision of the District Court was not, as the Court of Appeals thought, inconsistent with the decision of this Court in *Ickes v. Fox*, 300 U. S. 82, at an interlocutory stage of the proceedings. In that case this Court held that the United States was not an indispensable party, reasoning that the water users had a property right in their water and not, as the Government urged, merely a contract right to use water which was the property of the Government. Statements and phrases can be extracted from the opinion to show that the Court by way of dictum intimated that this water right was based either upon appropriation by the water users (300 U. S. at 94, 95), or was based upon and limited by their contracts with the Government as they were construed in practice (300 U. S. at 91, 94, 97). But in 300 U. S. 82 it was assumed, on the basis of the unchallenged allegations of the complaints, that the past use was beneficial, was confirmed by the successive Secretaries, and amounted to a practical construction of the water-right contracts. The Court therefore assumed that past use was the measure of the water right (300 U. S. at 91-92). The District Court, after an extended trial on the merits, which showed the allegations of the complaints in every

material respect to be untrue, found that the contracts were in fact the measure of the water rights, as shown by their terms and by the nature of the respondents' water use, and that there was no contrary construction of the parties (R. I, 303, 313, 325, 330, 342, 355, 361, 370, 383).

The court below reversed without in any respect questioning the sufficiency of the evidence to support the findings. Its decision seems to have been based upon a proposition of law, either (a) that respondents' water rights were based upon prior appropriation, or (b) that respondents had rights to the water at least analogous to prescriptive rights (R. III, 1454).³ Whatever the basic theory of the court below, and whether it be sup-

³ Another passage (R. III, 1454) suggests that, irrespective of contract and use alike, respondents are entitled to the amount of water needed for beneficial use. But neither this Court nor the court below could have intended to rule that the Bureau must deliver to each user the full amount needed for beneficial use without regard to the contracts or indeed to the water available, or to deliver free of charge extra amounts of water needed for beneficial use. If more water were needed for beneficial use than the amounts stated in respondents' contracts (which assumption was proved to be without basis), there is no state or federal law, or decision of any court, requiring the Secretary to deliver free of charge the extra amounts needed. Respondents cannot insist that the extent of their contract obligation to the United States is the amount provided in their water-right contract, and thus standing on their contracts so far as their obligation is concerned, ask that amounts of water in excess of the amounts provided in their contracts be delivered free of charge, and no such question was decided by this Court in its former opinion.

ported or contradicted by the intimations in the earlier decision of this Court, the result is, we submit, untenable as a matter of law and of the gravest consequence to the Reclamation Fund in practical effect.

1. (a) The water users cannot have rights based upon prior appropriation. The water right, as the court below expressly recognizes, was acquired by the United States. Whatever the rights of the United States,⁴ certainly the respondents can have no right of appropriation save one acquired in conformity with state law. Section 7410 of Remington's Revised Statutes, *infra*, pp. 30-32, provides in terms that there shall be no subsequent appropriation other than of the water released by the United States unless the project be abandoned. (See also R. I, 306, 364, and R. III, 1275, 1282.)

(b) It is equally clear that respondents' claims cannot be based upon prescription. The court below gives at least oblique approval to the theory of prescriptive rights by interpreting the decision

⁴ In *Nebraska v. Wyoming*, No. 7, Orig., October Term, 1943, the United States, having intervened (305 U. S. 561), urges that the United States is the owner of the unappropriated water of nonnavigable streams in the western states and acquires project water rights by reservation rather than by appropriation. This issue is not, under the pleadings and evidence, present in these cases. If it were, the Government would urge on similar grounds that respondents in no view could have rights to water other than those flowing from their contracts with the United States.

of this Court in the light of the Government's petition for rehearing (R. ~~II~~^{II, 1454} ~~π~~). But, if such was its ruling, it is directly contrary to the decisions of the Washington courts (*Weidensteiner v. Mally*, 55 Wash. 79 (1909); *Rhoades v. Barnes*, 54 Wash. 145 (1909)), and to the laws of the State of Washington. Section 7410 of Remington's Statutes, *infra*, pp. 30-32. Whatever the rights of the United States, certainly respondents cannot acquire property rights in contravention of state law.

(c) Whatever the theory which underlies the decision of the court below, it is clear that it reversed because the trial court held that the respondents' rights are based upon and measured by their water-right applications (R. III, 1453). Indeed, the court below enjoined the Secretary, in determining their water rights, from construing these instruments as contracts (R. III, 1458).⁵ But it seems entirely plain that this is just what the

⁵ The decision of the court below that the water right contracts or applications are *not* contracts seems to be based upon the fact that this Court held that the plaintiffs were entitled to bring a suit against the Secretary for the protection of property rights. But such rights, protected by statute or common law against impairment by public officers, may grow out of or be limited by contract; and the validity and construction of the contract may be determinative on the merits. The court below did not question that the \$52-per-acre construction charge is a fixed obligation which must be contractual in nature. In result it has created an instrument which is half contract and half something else, of undetermined effect.

water-right applications are, and that respondents' rights can be measured in no other way.

The water-right application of Parks is called a contract, those of the others simply an application, but each is obviously a contract both in form and in effect (R. II, 700, 707, 715, 723, 730). They were alleged by respondents in their complaints to be contracts (R. I, 5, 52, 74). This Court recognized (300 U. S. at 95, 96, 97) that the applications were contracts. Indeed, Congress itself has so defined the application.⁶ The settled rule of irrigation law, recognized by the state and federal decisions in every western state, is that where a water user enters into a contract with an irrigation company, or with the United States, for a water supply for irrigation purposes, the water user's rights to a supply

⁶ Section 45 of the Act of May 25, 1926 (44 Stat. 648), in terms defines water-right applications, such as are involved here, as contracts. The various reclamation laws direct the Secretary to furnish water by contract: see section 5 of the Reclamation Act of June 17, 1902 (32 Stat. 389, 43 U. S. C. sec. 431); section 4 of the Act of April 16, 1906 (34 Stat. 116, 43 U. S. C. sec. 567); Act of April 30, 1908 (35 Stat. 85); Act of February 21, 1911 (36 Stat. 925, 43 U. S. C. secs. 523, 524, 525); sections 1 and 2 of the Reclamation Extension Act of August 13, 1914 (38 Stat. 686, 687, 43 U. S. C. secs. 471, 472, 475); Act of January 25, 1917 (39 Stat. 868); Act of February 25, 1920 (41 Stat. 451, 43 U. S. C. sec. 521); section 5 of the Act of December 21, 1928 (45 Stat. 1060, 43 U. S. C. sec. 617d); sections 9 (c) and 9 (e) of the Reclamation Project Act of August 4, 1939 (53 Stat. 1187); section 9 of the Act of October 14, 1940 (54 Stat. 1119).

of water are based upon and are limited by the terms of the contract. Kinney on *Irrigation and Water Rights* (2d ed.) secs. 1513, 1514, pp. 2723, 2727.⁷ The Supreme Court of Washington and the Circuit Court of Appeals for the Ninth Circuit fully recognize this rule. *Wenatchee Reclamation District v. Titchenal*, 175 Wash. 398, 404 (1933); *Twin Falls Salmon River Land & W. Co. v. Caldwell*, 242 Fed. 177, 193-194, affirming 225 Fed. 584, 591, 599. The decision below is, therefore, in direct conflict with this large body of settled law.

2. Whatever the terminological or legal uncertainties of the decision below, or of the underlying decision in 300 U. S. 82, the result is entirely clear. In holding that because the respondents have in the past received water deliveries in excess of the amounts called for in their water-right contracts, they have a right to receive without payment corresponding amounts for the indefinite future, the decision will have a serious and possibly a catastrophic effect upon the administration of the reclamation program and upon the integrity of the Reclamation Fund.

It will be remembered that the Fund is a revolving fund made up from the returns from sales of public lands and the payments of construction charges by water users on the irrigation projects

⁷ We do not burden this petition with the 47 cases, from every western state, cited in petitioner's brief below (Br. 45-48) which support and apply this rule.

(32 Stat. 388, 43 U. S. C., sec. 391). The Secretary under the Reclamation Act is required by law to prevent the impairment or depletion of the Reclamation Fund and must make charges to the water users with a view of returning to the Reclamation Fund the estimated cost of construction of the projects (32 Stat. 388, 389; 43 U. S. C., secs. 419, 461). See *Swigart v. Baker*, 229 U. S. 187, 197; *Yuma County Water Users' Association v. Schlecht*, 262 U. S. 138, 143. On this theory, 45 projects have been put into operation since 1902, irrigating more than 3,500,000 acres of land at a total investment for power, irrigation, and other purposes, of over \$800,000,000,⁸ of which \$362,000,000 represents an investment which is now under contract for repayment by water users.

The consequences of the decision below go far beyond the Yakima project.⁹ There are, in addition, 20 projects on which about 32,000 individual water-right contracts, affecting 1,350,000 acres, have been made and which would seem similarly covered by the decision below.¹⁰ In the construction of reclamation projects, the storage is ordi-

⁸ Annual Report of Secretary of the Interior, 1942, pp. 5, 14, 24.

⁹ The three cases are test cases involving the rights of 3,000 water users with similar contracts in the Sunnyside Division of the Yakima project.

¹⁰ On 30 projects since 1926, the initial contracts have been made directly with the irrigation districts instead of the individual water users, but the decision below would seem to give the individual users the same rights to the water as though they contracted directly with the United States.

narily completed in advance of the irrigation canals and distribution facilities. On these projects, accordingly, the early water users have received for a long or a short period amounts of water in excess of that called for by the water-right contracts. Under the decision below this temporary excess of water would seem in every case to have ripened into a donated property right. The cost to the Reclamation Fund of such a result cannot be estimated but would certainly be many millions of dollars, and would often require the construction of additional works in order to give subsequent users the amounts called for by their contracts. The decision, in many projects, would also place the Bureau under the impossible task of supplying water equal to the maximum past use of all water users, those who used a temporary surplus and those who obtained and paid for their water later, thus eliminating the temporary surplus. The result would inevitably be to impair the Reclamation Fund, possibly to an extent that would force Congress to revise the entire theory of the reclamation program.

It is of equal importance that the decision below gives a premium to the water user who wastes water, and thus builds up a greater past use, and penalizes the user who conserves water and thus uses less per acre. It promotes and even requires grievous inequities and discriminations between the users, for they each will pay, for example, \$52 for 3 acre-feet and Fox, for example, will get 6

acre-feet and his neighbor, who practices economy in the use of water, 3 acre-feet or less.

The decision below not only undoes the intended effect of 32,000 contracts and 40 years' practice, but makes future administration difficult. Under section 4B of the Act of December 5, 1924 (43 Stat. 702, 43 U. S. C., sec. 412), and Section 9 of the Reclamation Project Act of 1939 (53 Stat. 1187) no project or division can be commenced unless the Secretary makes a finding of feasibility and that the costs will be returned to the United States. If the water right contracts yield to actual use by water users, it will be impossible to make reliable predictions of repayment unless the Secretary is resolute enough, and has a staff large enough, to insure that the early surplus water is turned down the river rather than being put even to temporary use by the early farmers.¹¹

In truth, the reclamation projects can be operated only on the basis which has prevailed for the entire 40 years of their history, and on which the Government's immense investment has been made. The amount of water to be made available is allocated to the irrigable acreage, the construction costs are placed against each irrigable acre,

¹¹ No language or agreement in the water-right contract would seem competent under the decision below to preserve the intention of the parties; if the present contracts had stipulated for "3 acre-feet and no more, even though excess water be delivered free of charge while it be available," this explicit and unnecessary language would apparently yield to the rights based upon past use.

and contracts are made (with the water users or their organization) for repayment of the specified costs for the specified amount of water. To allow past and temporary use to vary the amount of water required to be furnished under the contracts, while leaving the construction charges unchanged, is to invite bankruptcy of the Reclamation Fund and a disastrous uncertainty for the water user.

3. It is our position, here as in the courts below, that even if the water-right contracts are to be disregarded so far as they specify the amount of water to be delivered, the respondents are not in any event entitled to enjoin the Secretary, because 3 acre-feet (for Fox and Eder) and 3.5 acre-feet (for Parks) are all that are needed for beneficial use upon their lands. This question of fact was found against respondents (R. I, 313, 341, 371-372). The court below did not question the sufficiency of the evidence to support this finding but brushed it aside because, according to the court below, the district court "confused beneficial use with economical use" (R. III, 1456). This decision represents a dangerous innovation in the water law of the arid states.

We do not urge that a beneficial use requires the utmost possible economy in the use of water, regardless of expense. We do urge that it requires a reasonable economy in the use of water, and that a wasteful use cannot be beneficial. The rule was well stated in *Burley Irrigation District v. Ickes*,

116 F. (2d) 529, 535 (App. D. C.), that the right of the prior appropriator—

is qualified by the limitation, made in favor of subsequent appropriators and the widest possible use of water on arid lands, that all of the water he uses must be beneficially applied and with reasonable economy in view of the conditions under which the application must be made. Hence a use which is wasteful may be restricted in the interest of subsequent appropriators and thus of the conservation of water. Shortage makes the elimination of waste imperative.

The contrary decision of the court below in the present case, that beneficial use is something "far different" from an economical use, is in conflict with the general doctrine,¹² with the law established by the courts of the arid states,¹³ and with the rule followed by the Circuit Court of Appeals for the Ninth Circuit. *Vineyard Land and Stock*

¹² Kinney on *Irrigation and Water Rights* (2d Ed.), sec. 877, p. 1547, sec. 916, p. 1622.

¹³ *Shafford v. White Bluffs Land & Irr. Co.*, 63 Wash. 10, 14 (1911); *Hough v. Porter*, 51 Oreg. 318, 420 (1909); *Farmers' Cooperative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 535 (1909); *State v. Twin Falls Canal Co.*, 21 Idaho 410 (1911); *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 153 (1892); *California Pastoral & Agricultural Co. v. Madera Canal & Irr. Co.*, 167 Cal. 78, 81 (1914); *Hufford v. Dye*, 162 Cal. 147, 159 (1912); *Nichols v. Hufford*, 21 Wyo. 477, 492 (1913); *Hardy v. Beaver County Irr. Co.*, 65 Utah 28, 41 (1924).

Co. v. Twin Falls Oakley Land and Water Co.,
245 Fed. 30, 33.¹⁴

The trial court found that the water was wastefully applied to respondents' lands: an unnecessary amount of water ran off the surface as waste; there was excessive deep percolation; the use of open ditches instead of flumes caused heavy percolation losses; and 24-hour runs in a single set of furrows, instead of the customary 8 to 12 hours, wasted a large part of the water and even produced some injury to the lands. The respondents' practice was wasteful in the last respect when measured by the common and general practice in the division, and the failure to use flumes was not up to the reasonable standards of economy as practiced on "many other lands" in the division (R. I, 312, 342-343, 370-371). The court below, in ruling that on facts such as these respondents' use of water was beneficial, although uneconomical, has offered encouragement to the waste of water in the arid states. And, it may be noted, even on its own

¹⁴ The only case which the court below cites in this connection affords it no support. *Tulare Irrigation District v. Lindsey-Strathmore Irrigation District*, 3 Cal. (2d) 489, makes no distinction between beneficial use and economical use. The trial court's findings clearly come within the rule stated in that case, that the amount of water required to irrigate a water user's land should be determined by reference to the system used in the locality and that the water user should not be compelled to adopt a more expensive system not in common use in the same locality.

standards (R. III, 1456-1457), the facts found by the district court and not challenged by the court below show the respondents not to have followed the practices "currently considered reasonably efficient in the locality."

The decision below seems on this point to have been largely influenced by a superficial paradox. The court was of the view that the Secretary could not offer to sell additional water and at the same time assert that 3, or 3.5 acre-feet was the measure of beneficial use (R. III, 1456-1457). The court below, however, ignores the rule announced by Justice Rutledge in *Burley Irrigation District v. Ickes* that "shortage makes the elimination of waste imperative." In other words, under conditions of shortage rigid economy must and will be enforced but conditions of abundance of water permit a more liberal delivery as reasonably economical, and at such times practices may be tolerated which would not and could not be tolerated under conditions of shortage. Thus, the rule that "shortage makes the elimination of waste imperative" is a necessary corollary to the general rule stated in that case, and in *Vineyard Land & Stock Co. v. Twin Falls*, supra, that "no person is entitled to more water than he is able to apply to a reasonable and economical use." If there were no additional water available except that originally provided in the Yakima project, any allowance to the respondents in excess of the 3 or 3.5 acre-feet

would be wasteful and unwarranted as the original project approached its full development. But the construction of the Cle Elum Reservoir was intended considerably to increase the available water supply, and the amounts of available water could be increased, within reasonable limits, to the extent that the water users bore their share of the cost.¹⁵ Finally, even if this view of the court below were right, unless it reversed the findings of fact of the District Court it would be forced to find, not that respondents' use was beneficial, but that the Secretary's offer to sell more water was mistaken.

4. The court below, we believe, has misconstrued the reclamation laws in two other respects. (a) The opinion states (R. ^{III, 1454} π) that the Secretary cannot charge for the additional water, because section 4 of the Extension Act of August 13, 1914, *infra*, p. 28, provides that no increase in construction

¹⁵ Moreover, the offer of temporary rental of surplus water was not made with reference to the particular requirements of the three tracts of land before the court in the pending cases. It was general with the view that among the 3,000 farms of the Sunnyside Division there might be some who could use more water than their contract amounts without exceeding the amounts reasonably permissible under conditions of abundant water supply. If Secretary Wilbur in 1930 thought there might be some among the 3,000 water users of the Sunnyside Division who, under conditions of abundant supply, could make beneficial use of more water than 3 or 3.5 acre-feet, that view is in no way in conflict with the fact now definitely established that the three tracts of land involved here do not require for beneficial use more water than the amounts specified in their respective contracts.

charge shall be made without the consent of a majority of the water users. But this refers to an increase in charges for the water promised in the water-supply contracts, not for additional water developed by additional construction. (b) The opinion states (R. III, 1455) that the Cle Elum Reservoir was constructed in violation of the Act of March 3, 1915, *infra*, p. 29, apparently because the required agreement was not made with a majority of the Sunnyside water users. But the reservoir, to serve all five divisions of the project, was constructed only after an agreement to repay the costs had been obtained from the great majority of the Yakima project water users. (R. II, 954, 945.) If these rulings were to be followed elsewhere, they would constitute a most serious limitation upon the power to develop additional water supply.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for writs of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

FOWLER V. HARPER,
Solicitor,

J. KENNARD CHEADLE,
*Chief Counsel, Bureau of Reclamation,
Department of the Interior.*

SEPTEMBER 1943.





APPENDIX

Reclamation Act of June 17, 1902, 32 Stat. 388.

SEC. 1. That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: * * * (43 U. S. C. sec. 391.)

* * * * *

SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and com-

plete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon (43 U. S. C. secs. 419, 461.)

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual

bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act (43 U. S. C. secs. 431, 439, 381, 392).

* * * * *

SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right (43 U. S. C. secs. 372, 383).

* * * * *

SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect (43 U. S. C. sec. 373).

Act of August 13, 1914, 38 Stat. 687.

SEC. 4. That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid installments of construction charges: *Provided*, That the Secretary of the Interior, in his discretion, may agree that such increased construction charge shall be paid in additional annual installments, each of which shall be at least equal to the amount of the largest installment as fixed for the project by the public notice theretofore issued. And such additional installments of the increased construction charge, as so agreed upon, shall become due and payable on December first of each year subsequent to the year when the final installment of the construction charge under such public notice is due and payable: *Provided further*, That all such increased construction charges shall be subject to the same conditions, penalties, and suit or action as provided in section three of this Act (43 U. S. C. sec. 469).

Act of March 3, 1915, 38 Stat. 861.

No work shall be undertaken or expenditure made for any lands, for which the construction charge has been fixed by public notice, which work or expenditure shall, in the opinion of the Secretary of the Interior, increase the construction cost above the construction charge so fixed; unless and until valid and binding agreement to repay the cost thereof shall have been entered into between the Secretary of the Interior and the water-right applicants and entrymen affected by such increased cost, as provided by section four of the Act of August thirteenth, nineteen hundred and fourteen, entitled "An Act extending the period of payment under reclamation projects, and for other purposes" (43 U. S. C. sec. 470).

Remington's Revised Statutes of Washington:

SEC. 7408. *Eminent domain by United States.*—The United States is hereby granted the right to exercise the power of eminent domain to acquire the right to the use of any water, to acquire or extinguish any rights, and to acquire any lands or other property, for the construction, operation, repairs to, maintenance or control of any plant or system of works for the storage, conveyance, or use of water for irrigation purposes, and whether such water, rights, lands or other property so to be acquired belong to any private party, association, corporation or to the state of Washington, or any municipality thereof; and such power of eminent domain shall be exercised under and by the same procedure as now is or may be hereafter provided by the law of this state for the exercise of the right of eminent domain by ordinary railroad corporations, except that the United States

may exercise such right in the proper court of the United States as well as the proper state court (L. '05, p. 180, sec. 1).

SEC. 7409. *Rights of United States to use watercourses.*—The United States shall have the right to turn into any natural or artificial watercourse, any water that it may have acquired the right to store, divert, or store and divert, and may again divert and reclaim said waters from said watercourse for irrigation purposes subject to existing rights (L. '05, p. 180, sec. 2).

SEC. 7410. *Exemptions pending federal investigation.*—Whenever the secretary of the interior of the United States, or any officer of the United States duly authorized, shall notify the commissioner of public lands of this state that pursuant to the provisions of the act of congress approved June 17, 1902, entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," or any amendment of said act or substitute therefor, the United States intends to make examinations or surveys for the utilization of certain specified waters, the waters so described shall not thereafter be subject to appropriation under any law of this state for a period of one year from and after the date of the receipt of such notice by such commissioner of public lands; but such notice shall not in any wise affect the appropriation of any water theretofore in good faith initiated under any law of this state, but such appropriation may be completed in accordance with the law in the same manner and to the same extent as though such notice had not been given. No adverse

claim to any such waters initiated subsequent to the receipt by the commissioner of public lands of such notice shall be recognized, under the laws of this state, except as to such amount of the waters described in such notice or certificate hereinafter provided as may be formally released in writing by a duly authorized officer of the United States. If the said secretary of the interior or other duly authorized officer of the United States shall, before the expiration of said period of one year, certify in writing to the said commissioner of public lands that the project contemplated in such notice appears to be feasible and that the investigation will be made in detail, the waters specified in such notice shall not be subject to appropriation under any law of this state for the further period of three years following the date of receipt of such certificate, and such further time as the commissioner of public lands may grant, upon application of the United States or some one of its authorized officers and notice thereof first published once in each week for four consecutive weeks in a newspaper published in the county where the works for the utilization of such waters are to be constructed, and if such works are to be in or extend into two or more counties, then for the same period in a newspaper in each of such counties: Provided, That in case such certificate shall not be filed with said commissioner of public lands within the period of one year herein limited therefor the waters specified in such notice shall, after the expiration of said period of one year, become unaffected by such notice and subject to appropriation as they would have been had such notice never been given: And

provided further, that in case such certificate be filed within said one year and the United States does not authorize the construction of works for the utilization of such waters within said three years after the filing of said certificate, then the waters specified in such notice and certificate shall, after the expiration of said last named period of three years, become unaffected by such notice or certificate and subject to appropriation as they would have been had such notice never been given and such certificate never filed (L. '05, p. 180, sec. 3).

SEC. 7411. *Appropriation—Title to beds and shores.*—Whenever said secretary of the interior or other duly authorized officer of the United States shall cause to be let a contract for the construction of any irrigation works or any works for the storage of water for use in irrigation, or any portion or section thereof, for which the withdrawal has been effected as provided in section 7410, any authorized officer of the United States, either in the name of the United States or in such name as may be determined by the secretary of the interior, may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project, or projects, for which water has been withdrawn or reserved under the preceding section of this act, including any and all divisions thereof, theretofore constructed, in whole or in part, by the United States or proposed to be thereafter constructed by the United States, such appropriation to be made, maintained and perfected in the same manner and to the same extent as though such appropriation had been made by a private person, corporation

or association, except that the date of priority as to all rights under such appropriation in behalf of the United States shall relate back to the date of the first withdrawal or reservation of the waters so appropriated, and in case of filings on water previously withdrawn under said section 7410, no payment of fees will be required. Such appropriation by or on behalf of the United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made by a private person, corporation or association. The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works (L. '29, p. 183, sec. 1; Cf. L. '05, p. 182, sec. 4).



NOV 12 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

HAROLD L. ICKES, Secretary of the Interior, *Petitioner*,

v.

MAZINE Z. FOX, ET AL.

HAROLD L. ICKES, Secretary of the Interior, *Petitioner*,

v.

PHILIP LOUIS PARKS, ET AL.

HAROLD L. ICKES, Secretary of the Interior, *Petitioner*,

v.

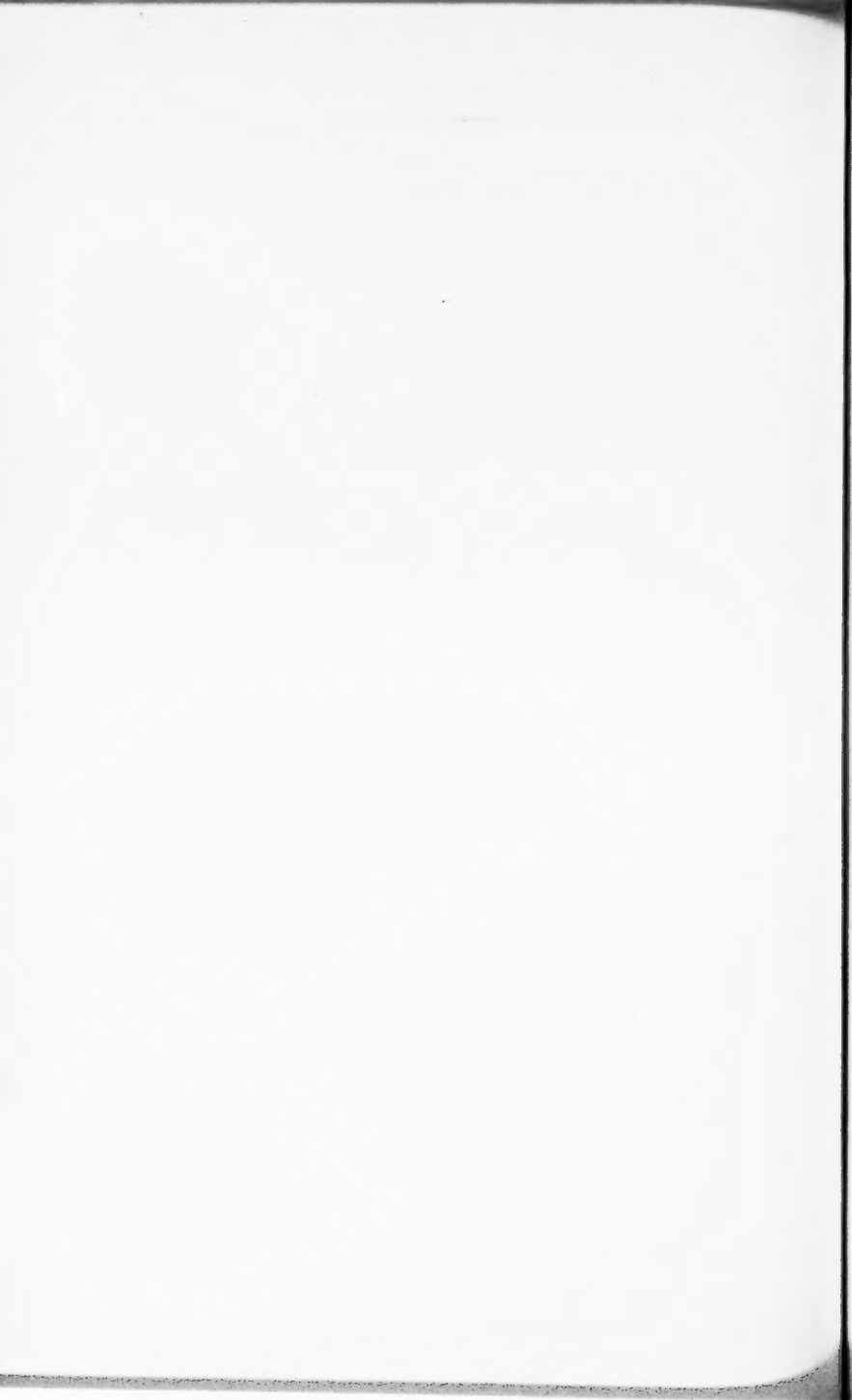
CHRISTINA MARIEA EDER, Executrix of Last Will and Testament of Jacob F. Ottmuller, *Deceased*.

**ANSWER TO PETITION FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA.**

STEPHEN E. CHAFFEE,
Attorney for Respondents,
Sunnyside, Washington.

WM. G. FEELY,
Mills Building,
Washington, D. C.

November, 1943.



INDEX.

	Page
Statement	2
Purpose of Notice of October 17, 1930	8
Reasons for Denying Writ—Law of the Case	11
Decision of Lower Court—In Harmony with State Law	12
Decision of Lower Court—In Harmony with Acts of Congress and State Statutes	15
Beneficial Use of Water	17
Findings of District Court	18
Comments on Petition	19
Conclusion	21

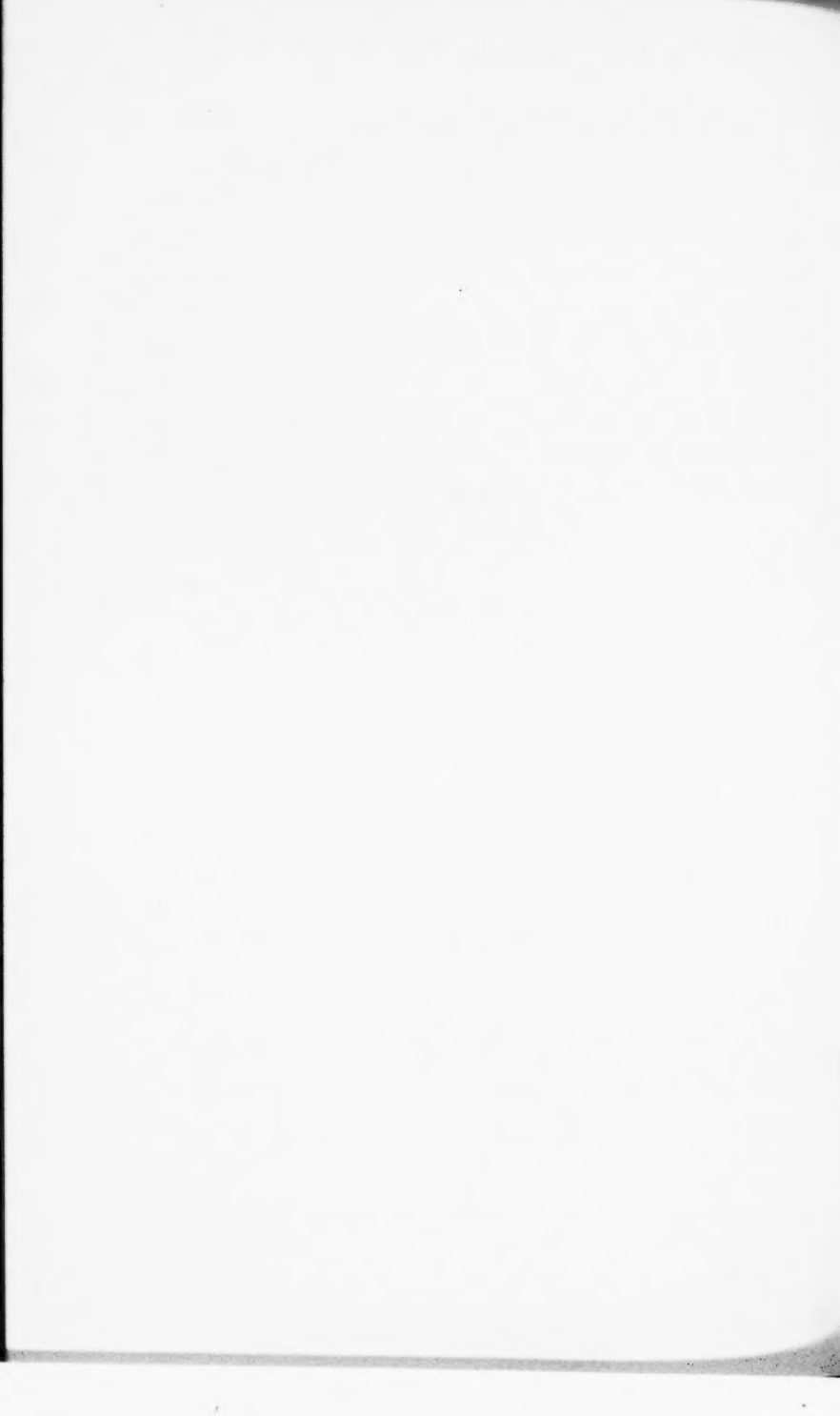
CITATIONS.

CASES:

Arizona v. California, 283 U. S. 423	19
California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142	12
Erie Railroad Co. v. Tomkins, 304 U. S. 54 S. Ct. 817	17
Hipp v. Prudential Life Insurance Co., 244 North- western 342	12
Ickes v. Fox, 85 F. (2d) 294	9
Ickes v. Fox, 300 U. S. 82	9
Ickes v. Fox, 137 Fed. (2nd) 30	11
Lawrence v. Southard, 192 Wash. 287 . . 2, 8, 13, 14, 17, 19	12
State of Nebraska v. State of Wyoming, 295 U. S. 40	12
United States v. Humboldt-Lovelock Irrigation Light & Power Company, 97 Fed. (2d) 38	13
Yuma County Water Users v. Schlect, 262 U. S. 137, 67 L. Ed. 909	5

STATUTES:

Reclamation Act of June 17, 1902 (43 U. S. C. A. Sec. 372; 43 U. S. C. A. Sec. 383)	2
Reclamation Extension Act of August 13, 1914 (43 U. S. C. A. Sec. 469)	2
Warren Act of February 21, 1911 (43 U. S. C. A. Sec. 523)	2, 16
Act of 1866 (43 U. S. C. A. Sec. 661)	15
Statutes of the State of Washington (Sec. 39, Chap. 117, Laws of 1917)	2, 17



IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 402.

HAROLD L. ICKES, Secretary of the Interior, *Petitioner*,

v.

MAZINE Z. FOX, ET AL.

No. 403.

HAROLD L. ICKES, Secretary of the Interior, *Petitioner*,

v.

PHILIP LOUIS PARKS, ET AL.

No. 404.

HAROLD L. ICKES, Secretary of the Interior, *Petitioner*,

v.

CHRISTINA MARIEA EDER, Executrix of Last Will and Testament of Jacob F. Ottmuller, *Deceased*.

**ANSWER TO PETITION FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA.**

The respondents, Fox, Parks and Eder, pray that writs of certiorari be denied herein for each and all of the following reasons, to-wit:

1. The decision by this court on former appeal (*Ickes v. Fox*, 300 U. S. 82) fixing beneficial use as the measure of respondents' water rights became the law of the case to be followed by the lower court and this court.

2. The decision of the lower court is in harmony with the statute (Sec. 39, Chapter 117, Laws 1917), and court decisions (*Lawrence v. Southard*, 192 Wash. 287) of the State of Washington and the Secretary of Interior "shall proceed in conformity with such laws." (43 U. S. C. A. 383.)

3. The decision of lower court is in harmony with the Act of 1866, 43 U. S. C. A. Sec. 661; Reclamation Act of 1902, Sec. 8, 32 Stat. 390; 43 U. S. C. A., Sec. 372 and 383; Warren Act of 1911, 36 Stat. 925; 43 U. S. C. A. Sec. 523; Reclamation Extension Act of August 13, 1914, 38 Stat. 686; 43 USCA Sec. 469, Sec. 39, Chap. 117, Laws 1917 of the State of Washington and decisions of both Federal and state courts.

STATEMENT.

On December 3, 1890, 1,000 second feet of the water of the Yakima River was appropriated to irrigate lands now served by the Sunnyside Canal, including respondents' lands. (R. II 669.) Prior to 1906 the Sunnyside Canal and distribution system of sufficient size had been constructed to irrigate 40,000 acres of land which included the Parks land. (R. II 691.) On June 23, 1906, the United States acquired by purchase the water appropriation, canal, and distribution system. (R. II 684.) On May 7, 1906, a contract was entered into between the Government and the Water Users Association on behalf of the respondents and others, which provided that the determination of the Secretary as to the number of acres capable of irrigation was "to be based upon and measured and limited by the beneficial use of water." (R. II 680.)

On December 2, 1907, the Secretary of Interior and Director of Reclamation, pursuant to Reclamation Act, reported to Congress and stated the measure of the water

rights of respondents and other water users in the Sunnyside Division as follows:

“As the new lands (Fox and Eder) are entitled to as much water as may be required for their crops, * * * this would entitle the old lands to a sufficiency of water. * * * A special form of contract (Parks) was prepared whereby the water user is to be furnished all the water his land may require for irrigation.” (R. II 691-2.)

The Secretary, pursuant to the act, estimated the cost of the project including sufficient reservoir capacity to supplement natural flow and to furnish respondents and others with the amount of water required under the contract of May 7, 1906, and as stated in his report to Congress on December 2, 1907, to be \$52.00 per acre for the Eder and Fox lands, and \$10.00 per acre for supplemental water right for Parks land.

Thereafter, the Secretary caused to be constructed reservoir and carrying capacity sufficient to meet the water requirements of all lands served by the Sunnyside Canal on the basis of the contract and report, approved a classification of the public notice (Fox and Eder) lands, “according to water requirements” (R. II 837), and issued public notice authorizing the delivery of 4½ acre-feet to the Fox and Eder lands and such additional amount as the Project Superintendent found was beneficially used thereon, provided that “the deliveries will be contingent on beneficial use, as determined by the Project Superintendent.” (R. II 948.) The Irrigation Manager and Project Superintendent issued rules and regulations relative to water deliveries which provided that “the delivery must be limited at all times to the amount beneficially used.” (R. II 974.)

Watermaster Chrestenson, who had charge of water deliveries to the Fox and Eder lands for 28 years, testified positively and his testimony was not contradicted, that he followed these rules and regulations and that no one ever made a request for additional water deliveries to either the

Fox or Eder tracts (R. I 456), and that when a request elsewhere in the District was made:

"I go on the place and ask the man what the complaint may be. I also go over the land as a general thing, and make up my mind whether he is making proper use of his water, or whether he has taken care of what he has got, and that goes a long way in determining whether I will grant him any more or not." (R. I 454.)

Watermaster Cheyne, who had been in charge of water deliveries to the Parks land for 28 years, testified positively that he followed these rules and regulations and that in only one instance did he ever see any evidence of improper irrigation on the Parks land, and further testified when additional water deliveries were requested that:

"I go on the land and have a conference with him (water user) and find out just what his complaints are. If it is a request for more water I look the place over thoroughly, examine the use he is making of it (the water), the condition of his ditches, * * *. If I am undecided about the condition of the ground I usually have a shovel in my automobile. I examine the ground and I examine the crops. If justified and we have the water to spare, I endeavor to help him out." (R. I 458.)

In 1931, Irrigation Manager, M. D. Scroggs, reported that:

"The practice in administering water deliveries under these contracts has been to supply on the basis of 3 acre-foot duty in all cases where requests for larger deliveries were not made. In the event that such requests were made the ditch riders were authorized to **increase deliveries up to 25% above the 3 acre-foot measurement**, provided the water was available and there is reasonable evidence that such excess was needed. In the event that a still larger amount is desired the approval of the Watermaster or the Irrigation Manager is required. The last statement applies particularly to the old supplemental lands (Parks) * * * The determination of the amount needed in excess

of 3 acre-feet has been a matter of determination in the field at the time when excess was requested and has been based upon the appearance and needs of the crop at that time. As the years have passed, it has come to be recognized that certain tracts needed more than others so that re-examination has not always been necessary. Generally speaking, however, the above procedure has been followed." (R. II 959.)

The total amount to be paid by the parties who contracted with the United States for repayment of construction costs in the Sunnyside Division is \$4,103,306.00. The actual cost of all the irrigation works in the division, excluding storage reservoirs constructed in the Yakima River, was \$3,491,003.00, thus, leaving \$612,303.00 to be applied upon reservoir construction costs. (R. I 615.)

The Kachess reservoir with a capacity of 220,000 second feet at a cost of \$750,226.00 was completed prior to 1912. The Keechelus reservoir with a capacity of 152,000 acre-feet at a cost of \$2,004,198.00 was completed prior to 1915. The Sunnyside Canal was enlarged to a capacity of 1300 second-feet prior to 1916. The average cost of storage construction per acre-foot in the Kachess and Keechelus reservoirs was \$7.40. (R. I 438, 446, 447. R. II 831.)

The average amount of stored or impounded water used on lands in the Sunnyside Division from 1917 to 1936, both inclusive, save and except 1918, was 63,143 acre-feet per annum. (R. II 801-A to 818.) The cost of constructing this reservoir capacity in the Kachess and Keechelus reservoirs was \$467,258.00 which left a profit to the United States of \$145,045.00 because the actual cost was less than the estimated cost, and under the decision in *Yuma County Water Users v. Schlect*, 262 U. S. 137, 67 L. Ed. 909, the United States became entitled to that profit.

At all times prior to 1930, the Secretary made water deliveries to respondents and other water users in the District served by the Sunnyside Canal on the basis of the contract of May 7, 1906, and the Secretary's report to Con-

gress, December 2, 1907, and sufficient to furnish all lands served by said canal with the amount of water required to fully irrigate the land to the full extent of the soil for agricultural purposes. The average amount delivered to all lands was 4 acre-feet, per annum. The amount delivered from year to year, and month to month varying dependent upon the amount of spring moisture and rainfall during the summer, the amount delivered to the public notice lands varying from .67 to 9.58 acre-feet per acre, per annum, dependent upon the amount required to irrigate each tract to the full extent of the soil, and to deliver on an average for ten years to the community lateral serving the Fox lands 5.43 acre-feet, to the Parks land an average of 5.93 acre-feet, and to the Eder lands an average of 6.08 acre-feet, per acre, per annum. (R. II 838 to 898, 901 to 906, 1035-6-8.)

In 1930 Commissioner Mead decided to construct the Cle Elum reservoir at an estimated cost of \$3,500,000.00 to store water to irrigate new lands to be brought under irrigation and cultivation. The estimated cost was \$1,000,000.00 more than would be returned from contracts theretofore entered into with the new divisions. Without consulting the respondents or officials of the District, he attempted to charge \$1,000,000.00 of the cost of the construction of this reservoir to the lands in the Sunnyside Division. In this connection Mr. Clark, a director whose testimony was not contradicted, testified:

“Dr. Mead made the statement that he had allocated all the money he could to the various projects and that there was still lacking one million dollars; he knew of no other place from which to derive this million dollars. He allocated it to the Sunnyside Division of the Yakima Project. He said he had certified this to the Secretary and the Secretary in turn would certify it to the President, which process had to be done before the dam could be completed or the work could be started, and that he could not make any change without a court order.” (R. I 608.)

Secretary O. W. Hoffman, whose testimony was not contradicted, testified:

“Commissioner Mead made the statement when asked how he allotted this money to the Sunnyside Project, that it was necessary to have a million dollars for the construction of the Cle Elum Dam, and that he didn’t know where else to place it so he placed it on the Sunnyside Project.” (R. I 497.)

U. S. District Counsel Stoutemyer, spokesman for the Secretary and Commissioner, urged the District Board to enter into contract to pay a million dollars. In connection with these negotiations, Director Roady, whose testimony was not contradicted, testified:

Q. Did he, (Stoutemyer) make any statement as to the method they would use in getting this money from the district?

A. He said he would call it excess waters to the land that needed it, and if we didn’t buy the water it would be collected anyway, and that we wouldn’t get any credit for it.

Later, after it was ascertained that the Cle Elum reservoir cost approximately a million dollars less than the estimated cost, Mr. Fyfe, whose testimony was not contradicted, testified:

“It was a conversation that I heard while in Mr. Stoutemyer’s room, between him and Mr. Chaffee as to the charges of the Cle Elum Dam, and Mr. Stoutemyer stated that the new districts had underwritten the cost of the Cle Elum Dam, and if he did not get the money out of us, they would have to pay for it.”

Q. What statement, if any, did I make pertaining to the cost of the dam, and what reply did he make?

A. You had made the statement to Mr. Stoutemyer that the estimated cost of the Cle Elum Dam was three million dollars and they had saved a million dollars in the construction of the dam, and you spoke about cutting that off, or why charge us a million dollars as long as they had saved that amount there, and Mr. Stoute-

myer stated that the government could always use a million dollars." (R. I 614.)

For the purpose of collecting the million dollars which the Commissioner and Secretary had levied against the water users in the Sunnyside Division, the Secretary, on October 17, 1930, without giving respondents or other water users or officials of the District a chance to be heard, issued public notice which had a three-fold purpose, to-wit:

1. To deprive respondents of the use of the carrying capacity (over 3 acre-feet for Fox and Eder, and $3\frac{1}{2}$ acre-feet for Parks lands) of the Sunnyside Canal and distribution system, and storage capacity in reservoirs which the United States had constructed for them, and for the payment of which construction costs it held a lien upon their lands, which lien Eder and Parks had fully paid, and the carrying and storage capacity so constructed permanently attached to their lands.

2. To deprive respondents of a portion of their right to the use of the natural flow and stored waters of the Yakima River which they acquired "by appropriation of and from the State of Washington, under the Reclamation Act" (*Lawrence v. Southard*, 192 Wash. 287).

3. To rent to respondents water when there was a surplus, above the limited amounts and to apply the rental money to pay a portion of the one million dollars levied by the Secretary against the Sunnyside Division, for the Secretary stated that the re-payment of the costs of the Cle Elum reservoir would be made by "one million dollars by rentals from the Sunnyside Division of the Yakima Project." (R. II 951-955.)

On May 5th the Secretary issued public notice attempting to deprive the Parks land of the use of water in excess of $3\frac{1}{2}$ acre-feet. (R. II 957.) For the purpose of enforcement of the collection of the million dollar charge so made, the Secretary advised Fox and Eder that they would be deprived of water in excess of 3 acre-feet and Parks in ex-

cess of 3½ acre-feet, unless they signed a water rental application. (R. I 79.) The respondents and other water users refused to sign the same.

On June 1, 1932, when more than 2,800 second-feet of natural flow water was running over the Sunnyside Dam to the ocean unused, the Secretary caused the main headgate to the Sunnyside Canal and the headgates to the community laterals serving respondents' lands to be partially closed so as to deprive respondents of the use of water above the limited amounts, and diverted the water above the limited amounts down the Yakima River and through wasteways into the river and completely destroying the same.

These suits were brought to vacate the public notice of October 17, 1930, and May 5, 1932, and for other equitable relief. The petitioner moved to dismiss the suits, which motion was denied by the trial court. Petitioner took an appeal to the United States Court of Appeals for the District of Columbia, *Ickes v. Fox*, 85 F. (2d) 294, which court sustained the judgment of the trial court and this court sustained the lower courts. *Ickes v. Fox*, 300 U. S. 82, 57 S. Ct. 412.

Copies of water right applications in the Fox and Eder cases and supplemental water right contract in Parks case were attached to the amended complaints. (R. I 26, 64, 87.) This court construed the contract with the Water Users Association of May 7, 1906, the water right applications in the Eder and Fox cases, and water right contract in the Parks case, Reclamation Act of 1902, and State Statute, and stated:

“Respondents had made all stipulated payments and complied with all obligations by which they were bound to the government, and, long prior to the issue of the notices and orders here assailed, had acquired a vested right to the perpetual use of the waters as appurtenant to their lands. Under the Reclamation Act, *supra*, as well as under the law of Washington, beneficial use was the basis, the measure, and the limit of the right.

And by the express terms of the contract made between the government and the Water Users Association in behalf of respondents and other shareholders, the determination of the Secretary as to the number of acres capable of irrigation was to be based upon and measured and limited by the beneficial use of water. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.

"And in those states, generally, including the state of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act, as well, part and parcel of the land upon which it is applied."

The act of Congress referred to by this court fixing the measure of the water right on a Federal Project is as follows:

"The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (43 U. S. C. A. Sec. 372.)

The laws of the State of Washington referred to in the court's opinion fixing the measure of respondents' water rights is as follows:

"To the use and enjoyment of the water of streams or creeks * * * for the purposes of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof." (Wash. Ter. Laws 1873. Page 520.)

REASONS FOR DENYING THE WRIT.

I.

Beneficial use and water right is appurtenant to the land is the law of the case.

On the former appeal the petitioner contended that the water right applications fixed the measure of the respondents' Fox and Eder water rights at 3 acre-feet per annum, and Parks at 3½ acre-feet per acre, per annum, and if petitioner's contention was correct then this court would have sustained his motion to strike, so the question as to the measure of the water right was directly at issue on the former appeal. Petitioner also contended that the government was the owner of the waters of the Yakima River, and the water rights and that because the government had an interest in the subject matter it was an indispensable party to the action. This court held that the title to the water was in the state, and the title to the water right vested in the respondents and was appurtenant to their lands. The court below, *Ickes v. Fox*, 137 Fed. Rep. 2nd 30, 33, followed the decision of this court and held that beneficial use was the measure of respondents' water rights and that the same were appurtenant to their lands.

Respondents have always contended and now contend that there is no conflict between the water right applications in the Fox and Eder cases and water right contract in the Parks case, and the act of Congress fixing beneficial use as the measure of a water right on a federal project, and the measure of a water right by appropriation as declared by the Legislature of the State of Washington. It is elementary that the Reclamation Act fixing beneficial use as the measure of the water right and the state statute fixing the measure of a water right by appropriation as the amount necessary to make the "land available for agricultural purposes to the full extent of the soil thereof" became a part of the water right applications and contract

with the same force as though expressly incorporated therein, and in the event there is any conflict the Act of Congress and the state statute, the same will prevail over any inconsistent provision in the applications and contract. This rule is clearly stated in *California-Oregon Power Company v. Beaver Portland Cement Company*, 295 U. S. 142, 162; 55 S. C. Rep. 725, 731, as follows:

“The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein.”

Hipp vs. Prudential Life Insurance Company, 244 N.W. 342.

II.

The decision of the lower court is in harmony with the statute and court decisions of the state of Washington.

Sec. 8 of the Reclamation Act, 43 U. S. C. A., Sec. 383, provides:

“That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation or any vested right acquired thereunder, and the Secretary of Interior, in carrying out the provisions of this act shall proceed in conformity with such laws.”

In *State of Nebraska v. State of Wyoming*, 295 U. S. 40; 55 S. C. Rep. 568, this court stated:

“Reservoirs of large capacity have accordingly been constructed and operated by the United States but solely under and subject to the irrigation and appropriation laws of Wyoming. * * * All the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release water of the river are subject to the authority of Wyoming.”

Mason v. Tax Comr. of Washington, 302 U. S. 186.

In *United States v. Humboldt-Lovelock Irrigation Light & Power Co.*, 97 Fed. (2d) 38, 42, where the water rights involved were located in the State of Nevada, the court stated:

“Whatever right appellant may have, and the extent thereof must be determined by the law of Nevada, 43 U. S. C. A. 383, *California Oregon Power Co. v. Cement Co.*, 295 U. S. 142, 155, 162; 55 S. Ct. 725, 728, 739, 79 L. Ed 1356. We must therefore, review the statutes and decisions of that state, to determine the questions herein.”

The Supreme Court of the State of Washington in *Lawrence v. Southard*, 192 Wash. 287, did review the statutes, and decisions of that court where the identical question at issue in these cases (the title to the water right above three acre-feet upon an application identical to the one in the Eder case, the one most favorable to the petitioner) was decided and that decision is based upon grounds such that none of the facts set up in the answer of the petitioner and none of the findings of fact in these cases would change the decision of that court which held that the title to the water right above 3 acre-feet was vested in the land owner upon three separate foundations, to-wit:

(1). Reclamation Act. It is admitted that the Bureau of Reclamation and the United States pursuant to public notices issued by the Secretary and rules and regulations promulgated by the Project Superintendent and Irrigation Manager actually delivered to the Fox lands 5.43 acre-feet, to the Parks lands 5.93 acre-feet, and to the Eder lands 6.08 acre-feet, per acre, per annum, on an average for ten years. The right to the use of this amount of water above the 3 acre-feet was “acquired under the provision of the Reclamation Law” which expressly declares that any right so acquired “shall be appurtenant to the land irrigated.”

(2). Statutes and decisions of the State of Washington. By act of the Legislature, Session Laws 1873, Page 520,

the measure of the right of appropriators were defined as follows:

“That any person * * * who may have or hold a title or possessory right or title to any agricultural lands * * * shall be entitled to the use and enjoyment of the waters of the streams or creeks * * * for the purpose of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof.”

In *Lawrence v. Southard*, 192 Wash. 287, the court reviewed the former decisions and statutes of that state upon the identical question involved in these acts and stated:

“The right to the use of the impounded and natural flow waters was acquired for the land which is the subject matter of the controversy, by the beneficial use of those waters upon the land for agricultural purposes (*Longmire v. Smith*, 26 Wash. 439; 67 Pac. 246; 58 L. R. A. 308) and became a part thereof (*Ament v. Bickford*, 139 Wash. 494, 495, 247 Pac. 952, whether the water was from natural flow, or stored in a reservoir (*Madison v. McNeil*), 171 Wash. 669, 675; 19 Pac. (2d) 97) and appurtenant thereto. The water code, Sec. 39, Chap. 117, Laws of 1917, p. 465, provides that ‘the right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used.’ Water in excess of three feet had been applied to a beneficial use upon the land involved in this action for a period of six years prior to the enactment of the water code of 1917, which expressly declares that, where water has been applied prior to the date of the enactment of the statute to a beneficial use, it shall be and remain appurtenant to the land.”

(3). Title by prescription. In the *Lawrence v. Southard* case the court said:

“Respondent and his predecessors in ownership of the land have enjoyed the beneficial use of the amount of water necessary to beneficially irrigate the land to the full extent of the soil thereof, for agricultural purposes, for a period of twenty-five years, without let

or hindrance from anyone, and by such use the respondent has acquired a prescriptive right which vest title in respondent as completely as if it were conveyed by deed. *Weitensteiner v. Engdahl*, 125 Wash. 106, 215 Pac. 278."

III.

Decision of lower court is in harmony with acts of Congress, state statutes and federal and state court decisions.

The Act of 1866 (Title 43, Sec. 661, U. S. C. A.) provides:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

It is admitted that respondents used the water delivered to their lands by the Bureau of Reclamation for agricultural purposes pursuant to the local customs, rules and regulations promulgated by the Secretary of Interior, and the respondents as "the possessors and owners of such vested rights shall be maintained and protected in the same", as against the unlawful acts of the Secretary of Interior.

The Reclamation Act of 1902, Sec. 8, 43 U. S. C. A. Sec. 372 provides:

"That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

The Bureau of Reclamation delivered to the respondents under the provisions of the Reclamation Act in excess of the limited amounts of water and by the express terms of the act the right to the use of water to the extent the same was so delivered became "appurtenant to the land "irri-

gated" and as this court has stated on the former appeal "part and parcel of the land upon which it is applied."

The Warren Act of February 21, 1911, 43 U. S. C. A. Sec. 523, provides:

"That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior preserving a first right to lands and entryman under the project is hereby authorized upon such terms as he may determine to be just and equitable to contract for the impounding, storage, and carrying of water to an extent not exceeding such excess capacity with irrigation systems. * * *

The Secretary gave the reason for the issuance of the public notice of October 17, 1930 that the United States had contracted with the Kittitas Reclamation District. The contract with that district, however, was made subject to the "diversion rights that have been set aside for the use and benefit of the Sunnyside." (R. II 1057.)

Sec. 4 of the Reclamation Extension Act of August 13, 1914, 43 U. S. C. A. Sec. 469, provides "that no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement with the Secretary of Interior and the majority of the water right applicants and entryman to be affected by such increase."

The public notice of October 17, 1930 provided for the rental of surplus water as follows:

"All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima Project." (R. II 953.)

The letter from the Secretary to the President of December 11, 1930, states that the cost of the Cle Elum reser-

voir is \$3,500,000.00 and that of this sum there will be returned to the reclamation fund:

“\$1,000,000.00 by rentals from the Sunnyside Division of the Yakima Project.” (R. II 955.)

Section 39 of Chap. 117, State Laws of 1917 provides:

“The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used.”

The Court in the *Lawrence v. Southard* case, in construing this statute said:

“Water in excess of 3 acre-feet had been applied to a beneficial use on the land involved in this action for a period of six years prior to the enactment of the water code of 1917, which expressly declares that where the water has been applied prior to the date of enactment of the statute to a beneficial use it shall be and remain appurtenant to the land.”

Since the decision in *Eric Railroad Co. v. Tomkins*, 304 U. S. 54, S. Ct. 817, the Federal Courts are firmly committed to the doctrine that:

“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state, and whether the law of the state shall be declared by the legislature in the statute, or by the highest court in a decision, is not a matter of Federal concern.”

BENEFICIAL USE OF WATER.

Government records of amount of water delivered and crop production on respondents' lands from 1917 to 1939, both inclusive, (R. I 1041-2-3) as explained by study of same (R. I 1044-5-6) conclusively establish the fact that the crop production of respondents' lands fluctuated in direct ratio to amount of water used in irrigating the same up to the

greatest amount used thereon, and that the full production value of these lands cannot be reached and maintained only by the application of a sufficient amount of water to irrigate the same "to the full extent of the soil thereof."

The "expert" Johnson, upon whose testimony the district court based its findings, testified that he would not be able to estimate the per cent of crop production which could be obtained upon respondents' lands by the use of the limited amounts of water. (R. I 644.)

FINDINGS OF THE DISTRICT COURT.

The findings of the district court are flatly contradicted by government records, unchallenged testimony of government employees, and the physical facts. To illustrate—in order to make finding that previous Secretaries had not made water deliveries upon the basis provided in public notices, rules and regulations, the district court found "the ditch riders and water masters and other local employees of the Reclamation Bureau, who delivered excess water under the 'holler' system were not qualified to determine the amount of water needed for beneficial use on the lands."

The utter absurdity of this finding is apparent because the "expert" Johnson, upon whose testimony the trial court based its findings, testified he spent at the rate of one minute per acre in classifying the old supplemental (Parks land (R. I 641) and that he did not classify the public notice (Eder and Fox) lands (R. I 642). It had been the duty of Watermaster Chrestenson and Cheyne for a period of 28 years to study the water requirements of respondents' lands and to make water deliveries on the basis of beneficial use. Both testified that they followed the public notices issued by the Secretary and the rules and regulations which limited deliveries to beneficial use. (R. I 455, 460.)

Another illustration of the absurdity of the trial court's findings is the finding that the Sunnyside Canal was designed and constructed to carry only 3 acre-feet to respondents' and other water users' lands. While, in truth and in fact, the government records show that the canal and distribution system had carried for many years on an average of 4 acre-feet. (R. 901-8-81.)

COMMENTS ON PETITION.

1. (a). Appropriation. This court on former appeal and Washington court (*Lawrence v. Southard*) held respondents were the owners of water rights to the extent of past use by appropriation. *Arizona v. California*, 283 U. S. 423, 459.

(b). Prescription. The Act of 1866 expressly states that the "right to the use of water" which has vested "shall be maintained and protected". Respondents' rights vested when water was first used on their lands. *Longmire v. Smith*, 26 Wash. 439.

The Reclamation Act of 1902 provides that "the right to the use of water acquired under the act "shall be appurtenant to the land." The right to the use of water above the limited amount became appurtenant to the land under this act.

Section 39, Chap. 117, Laws of 1917 provides that the right to the use of water "shall be and remain appurtenant to the land" and the court in *Lawrence v. Southard* held this was legislative confirmation of previous holdings of the court.

(c). The court below reversed the district court because Congress fixed beneficial use as the measure of the water rights.

2. Government records conclusively established the fact that contracts have been entered into which will fully repay all sums advanced by the United States for construction and leave a profit of \$145,045.00 (R. II 825, 830.)

If decision of district court is upheld a water user in a Federal project would have no right which the Secretary would be required to recognize.

Government crop records supported by testimony of Watermasters Cheyne and Chrestenson, and respondents' neighbors, conclusively established the fact that the water was not wasted but was beneficially used in crop production.

The decision below is in complete harmony with the practice of the Bureau of Reclamation on the Yakima Project at all times prior to the promulgation of the notices sought to be vacated, and in harmony with the practice on the Hermiston, Menindoka, Burley and Truckee-Carson projects.

3. The respondents' rights were acquired under and pursuant to the custom and practice inaugurated and consistently followed by previous Secretaries of the Interior for a quarter of a century. 2800 second-feet of natural flow water were going to waste at the time the headgates were partially closed on June 1, 1932. There was a heavy carry-over in reservoirs at the end of each year. (R. II 910.) The Secretary partially closed the gates to enforce payment of the million dollar charge.

4. The Reclamation Extension Act positively forbids the increase of construction charges and the Act of March 3, 1915, requires the Secretary to procure binding contracts sufficient to cover all costs prior to proceeding with the construction which he failed to do.

The controlling question presented by the petition herein is;

Does the Secretary of the Interior have the power to issue a Public Notice which overrides the Act of 1866, Reclamation Act of 1902, Warren Act of 1911, Reclamation Extension Act of 1914, Sec. 39 of Chap. 117 Laws of Washington

for 1917, federal and state court decisions and to deprive the respondents of their water rights in violation of both Federal and State Constitutions without giving them a chance to be heard?

If this question is answered in the negative then the petitions must be denied.

CONCLUSION.

For these reasons it is respectfully submitted that the petition for writs of certiorari should be denied.

STEPHEN E. CHAFFEE,
Attorney for Respondents,
Sunnyside, Washington.

WM. G. FEELY,
Mills Building,
Washington, D. C.

November, 1943.



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 2

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

MAZINE Z. FOX, ET AL.

No. 3

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

PHILIP LOUIS PARKS, ET AL.

No. 4

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

CHRISTINA MARIEA EDER, EXECUTRIX OF LAST WILL
AND TESTAMENT OF JACOB F. OTTMULLER, DECEASED

REPLY MEMORANDUM FOR THE PETITIONER

This memorandum is confined to a comment on
Lawrence v. Southard, 192 Wash. 287, on which

(1)

respondents heavily rely in the brief in opposition to certiorari. That decision, while discussed in the briefs below, was not referred to in the opinion of the court. For a number of reasons it is not relevant here, even on the limited issue of state law, on which alone it could be authoritative.

That case arose as a friendly suit for rescission of a contract for the sale to plaintiff of a parcel of land owned by defendant on the Yakima project, the contract containing a conveyance of a described water right which plaintiff alleged the defendant did not possess. Defendant prayed that the contract be enforced, on the ground that the conveyance was effective. Both parties moved for judgment on the pleadings. The Supreme Court of Washington affirmed a judgment for defendant. In a concurring opinion, Justice Beals pointed out (p. 304) that "The parties chose to submit the cause upon motions for judgment on the pleadings, which admitted all the allegations contained in the complaint and the answer thereto. No evidence was taken, the parties having, in effect, submitted to the court for determination a question of law to be decided upon an agreed statement of facts." After pointing out that the "real question" as to the amount of water which the appellant was entitled to receive could only be heard in some proceeding to which the Federal authorities were parties, the concurring opinion concluded (pp. 304-305) that "no question is here determined save the very

narrow issue of whether or not, upon the facts as pleaded and admitted by the parties to this litigation, the contract as between them is, as between themselves, good and should be carried out. No questions of fact have been determined in this case by judicial finding." Indeed, as will be seen, the essential facts as agreed to by the parties in that case are the contrary of those established and found in the cases at bar.

Appropriation Rights.—The fundamental false assumption in that case was that the United States had not completed its appropriation, by reason of failure to comply with the laws of the State of Washington, and that as the United States had thus failed in this respect, the water users had appropriated the water by applying it to their lands to beneficial use. The court stated, adopting the agreed facts, that while the United States in 1905 filed a withdrawal of the waters of the Yakima River, as provided in Ch. 88, Sess. Laws of 1905 (now appearing as sections 7408–7413 of Remington Revised Statutes, see Petition, App. pp. 29–33), it failed to comply with the procedural requirements of Section 4 of that Act relating to the appropriation of the waters of the Yakima River; and that "the right to the use of the impounded and natural flow waters was acquired for the land which is the subject matter of this controversy by the beneficial use of those waters upon the land for agricultural purposes."

That assumption, upon which the decision in that case turned, is precisely opposite to the facts established in these cases as embodied in the unchallenged findings of fact of the trial court (R. I. 306, 364, 333-334). The trial court found that under date of March 4, 1905, the Secretary of the Interior, acting through his direct subordinate, T. A. Noble, duly withdrew and appropriated, under the provisions of the act of the legislature of the State of Washington, approved March 4, 1905, all of the then unappropriated waters of the Yakima River and its tributaries for the purpose of the irrigation of the lands of all of the various divisions of the Yakima River project, and under date of April 23, 1906, filed a supplemental withdrawal and appropriation of the unappropriated waters; that the United States, acting through the Secretary of the Interior, has complied with the provisions of the laws of the State of Washington applicable to the withdrawal and appropriation of a water supply for the purposes of the Yakima project, and the right of the United States to store, impound, divert, and distribute the waters for the purpose of the water filings ~~and~~ is now in good standing; that under orders dully made by the State Supervisor of Hydraulics, the time allowed for completion of works and beneficial use under the said filings has been extended down to the present time; and that the last extension

(as of the date of the trial herein) extends to December 31, 1942 (R. I. 306, 364, 333-334).

As the Government has pointed out (Petition p. 12), Section 7410 of Remington Revised Statutes expressly provides that waters withdrawn by the United States for reclamation purposes shall not thereafter be subject to appropriation so long as the United States obtains orders from the State extending the time for completion of works, and Section 7411 expressly provides that the United States may appropriate so much of the unappropriated waters as may be required for the project for which water has been withdrawn, such appropriations to be made, maintained and preserved in the same manner and to the same extent as though such appropriation has been made by a private person or corporation, except that the date of priority shall relate back to the date of the first withdrawal of the waters so appropriated. The orders extending the time for completion of work, issued pursuant to the applications of the United States under Section 7410, specifically provide that "during said period the water specified in the aforesaid notices shall not be subject to appropriation under any other law of the State of Washington" (R. III, 1275; R. I, 306-307, 364-365, 334).

In *Lawrence v. Southard*, *supra*, there was significantly missing from the agreed and limited facts, the fact that the withdrawal by the United

States of the waters of the Yakima River had been effected in 1905 and 1906, prior to the time of the water contract with the United States in question (and also prior to the date of the contracts of respondents Fox, Parks, and Eder) and that the withdrawal was in full compliance with the laws of Washington, had been kept in good standing, and was in full force and effect. This significant fact was not only found in the present cases, but was admitted (R. III, 1166-1167, 1276).

Prescriptive Rights.—Respondents also rely upon the *Southard* case as establishing a prescriptive right. Again, the court's discussion of prescriptive rights was premised upon an assumed set of facts and has no application to these cases. Respondents could acquire no rights by prescription in these cases for at least four reasons.

(1) Respondents here could not prevail under settled principles of the law of prescription. Respondents offered no evidence of prescriptive use. Contrary to the assumed facts in the *Southard* case, the record at the trial in these cases showed only a permissive use of the excess water in question; and the record also shows that deliveries of excess water were not continuous for any period of ten years, but were interrupted whenever surplus water was not available for delivery, particularly in low-water years (R. III, 1302, 1438). The decisions in the Supreme

Court of Washington, which the *Southard* case does not disturb, are to the effect that prescriptive rights to irrigation waters cannot be acquired unless the enjoyment relied upon by the claimant was of such character as to afford a ground for action by the other party. *Dontanello v. Gust*, 86 Wash. 268, 271; *Smith v. Nechanicky*, 123 Wash. 8, 14. Also, that court has held uniformly that user, to be adverse, must be attended by actual notice or by such circumstances as would impart notice to the person affected of the hostile character of the claim. *Sander v. Bull*, 76 Wash. 1, 6; *City of Raymond v. Willapa Power Co.*, 102 Wash. 278, 283; *In re Water Rights in Alpowa Creek*, 129 Wash. 9. Furthermore, permissive use of water in the State of Washington gives no title by prescription. *Weidensteiner v. Mally*, 55 Wash. 79, 81; *Rhoades v. Barnes*, 54 Wash. 145, 148. The decisions of the Supreme Court of Washington are consistent with the general rule on the subject as uniformly applied in the western states. See Kinney, *Irrigation and Water Rights* (2d ed.), p. 1880, Sec. 1050.

(2) Section 3 of the act approved March 4, 1905 (Rem. Rev. Stat. Sec. 7410, see Petition, App., pp. 30-32) which provides for withdrawals of waters for Federal reclamation projects, expressly prohibits any acquisition of withdrawn waters by adverse claim or otherwise. In the *Southard* case

the court assumed erroneously that the United States had failed to comply with this statute.

(3) It is fundamental, of course, that respondents could not acquire a prescriptive right to any amount of water in excess of that needed for beneficial use. In the *Southard* case, it was assumed erroneously that past use was beneficial use. It was assumed, upon unproved facts, that the water in excess of 3 acre feet, to which the court held that defendant had acquired a prescriptive right, was necessary for beneficial use. In these cases, it was affirmatively established that 3 acre feet (in the *Fox* and *Eder* cases) and 3½ acre feet (in the *Parks* case) are all that are needed for beneficial use, and the trial court so found (R. I. 313, 341, 371-372).

(4) Even apart from the foregoing reasons, the decision could not be accepted as adjudging a prescriptive right against the United States. Whatever the rights of the United States, such a prescriptive right would have to include a share of the Government-owned canals and reservoirs, for stored or natural flow waters flowing in the Yakima River would be of no value to respondents unless they also acquired by prescription the Government's title to the Government-owned reservoirs and canals, without which the water could not be conserved or conveyed to the land. Cf. *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408-409. The dissenting opinion in the *Southard*

case, rejecting the inference of a prescriptive right against the United States, is therefore sound in its conclusion on what is at the very least a Federal question, not to be settled by a state court decision. Cf. *Sola Electric Co. v. Jefferson Co.*, 317 U. S. 173, 176-177.

Finally, it is evident that the *Southard* decision does not touch the ultimate question in these cases, whether the Secretary of the Interior had authority under the Reclamation Act to issue the notice here attacked, fixing a charge for additional water as between respondents and the United States.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

FOWLER V. HARPER,
Solicitor,

J. KENNARD CHEADLE,
*Chief Counsel, Bureau of Reclamation,
Department of the Interior.*